
(1956) 02 RAJ CK 0009

In the Rajasthan High Court

Case No : Second Appeal No's. 52 to 60 of 1954

Kanhyaalal and Others

APPELLANT

Vs

Ramkumar and Others

RESPONDENT

Date of Decision : 06-02-1956

Acts Referred:

Arbitration Act, 1940 — Section 25, 8, 8(1)

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1

Negotiable Instruments Act, 1881 (NI) — Section 1, 106, 15, 35, 37

Citation : AIR 1956 Raj 129 : (1958) RLW 317

Hon'ble Judges : K.N. Wanchoo, C.J;I.N. Modi, J

Bench : Division Bench

Advocate : Party in person, for the Appellant; M.M. Vyas, for the Respondent

Final Decision : Allowed

Judgement

Modi, J.—These nine appeals are directed against a common judgment of the District Judge, Bikaner, and raise identical questions. They originally came for hearing before a learned single Judge who thought fit to refer them for decision to a Bench, as the valuation of the appeals taken collectively is above Rs. 5000/-.

2. The appeals arise out of nine suits filed by the plaintiff Ramkumar against the present appellant Kanhyaalal, and Bansilal and Hazarilal father and son respectively. The plaintiff's case as disclosed in the plaint in case No. 331 of 1949 was that defendants Nos. 1 and 2, namely, Bansilal and Hazarilal being father and son, were members of a joint Hindu family and carried on a joint family business, that they were building contractors and required money in connection with the execution of certain contracts which they had undertaken, and, therefore, Hazarilal as manager of the joint family business borrowed a sum of Rs. 1000/- from the plaintiff under the surety ship of defendant No. 3 Kanhyaalal and agreed to pay interest at the rate of 1 per cent, per mensem, and in lieu of this arrangement between the parties, on Asad Vadi 9 Smt. 2005 (corresponding to the 1st July 1948) defendant Hazarilal on behalf of himself and

his father drew a Hundi for Rs. 1000/- which was made payable after 121 days, and defendant No. 3 Kanhyalal was therein mentioned to have deposited the said money. If [k;k ckcwdUgS;kykyth odhy ds ikl Bansilal Hazarilal drew this Hundi on themselves, the Hundi being a "shahjog" Hundi, and Kanhyalal defendant appellant is said to have endorsed it on the same day in favour of the plaintiff Ramkumar. The plaintiff's case further was that on the expiry of the "muddat", this Hundi was presented to the defendants for payment on Kati Vadi 10 Smt. 2005 (corresponding to 27th October, 1948) but no payment was made, and thus the Hundi was dishonoured.

The plaintiff, therefore, brought this suit on 23-7-1949, for Rs. 1000/- principal and Rs. 90/- as interest up to the date of suit and prayed for a decree against all the defendants. The Hundis in the other suits namely 332 to 339 of 1949 were executed on Asad Sudi 3 Smt. 2005 (equal to 9th July 1948) and were made payable 31 days after date but apart from this difference, the other material facts on which those suits are based are the same.

The amounts claimed in these other suits are Rs. 1000/- principal and Rs. 160/- by way of interest in each case. There is only one more point of distinction between the Hundi in suit No. 331 and the Hundis in the other suits (Nos. 332 to 339), which is material for the purposes of the present appeals and that is that whereas the endorsement on the Hundi in case No. 331 dated Asad Vadi 9 Smt. 2005 by the endorser Kanhyalal bears his signature at the end of the endorsement which was also in his own handwriting, the endorsements on the other Hundis, though they are in the handwriting of Kanhyalal, they admittedly do not bear any signature of his at the foot thereof.

3. The suit was resisted by defendant Bansilal on the ground that he had nothing to do with the Hundis in question or with the business in connection with which they were alleged to have been executed and that his son Hazarilal carried on a separate business by himself.

So far as defendant Hazarilal is concerned, he also supported his father and pleaded that they were not members of a joint Hindu family nor did they carry on any joint business and that they did their business absolutely independently of each other.

Hazarilal further denied to have stood in need of borrowing any money from the plaintiff & contended that there were certain speculative or wagering transactions between him & the plaintiff and, therefore, he (Hazarilal) had been prevailed upon to execute these Hundis and that as defendant No. 3 Kanhyalal was his (plaintiff's) friend, the plaintiff wanted his name to be entered in the Hundis so that Hazarilal could be precluded from attacking those transactions on the ground of their being of a wagering character. The present defendant appellant Kanhyalal did not defend the suits at all and allowed them to proceed ex parte against himself.

4. The trial Court dismissed the suits against Bansilal but without costs, and

decreed them against Hazarilal and Kanhyalal. Thereupon Kanhyalal and Bansilal went in appeal to the District Judge, Bikaner. The appeals of Eansilal (which were only in the matter of costs) were dismissed and he has not filed any further appeal. Kanhyalal's appeals were also dismissed by the District Judge and he has filed the present appeals to this Court.

5. We may at once state that so far as the execution of the nine Hundis is concerned, there is a concurrent finding of both Courts below that these had been executed by Hazarilal. There is also a concurrent finding to the effect that the endorsement on all these Hundis is in the handwriting of the present appellant Kanhyalal, and that in case No. 331, the endorsement further bears the signature of Kanhyalal at the end thereof. These findings are clearly findings of fact and they are not open to any attack in this second appeal.

6. Learned counsel for the defendant appellant, however, raised a number of contentions before us, based on the contention that the Negotiable Instruments Act (Act 26 of 1881) was applicable to these cases. This contention was met on the other side by a two-fold reply.

In the first place it was argued that the Negotiable Instruments Act did not in terms apply to Shahjog Hundis at all, and as it was common ground between the parties that the hundis in the cases before us are Shahjog hundis, the rights of the parties could not be held to be governed by the said Act.

The other contention on behalf of the plaintiff respondent was that in any case, the Negotiable Instruments Act was not in force in the former State of Bikaner in which part of Rajasthan these cases arose in 1948-49 when the present hundis came to be executed, or the present suits were brought; and, therefore, the technical provisions of that Act did not and could not come into play.

We have not felt induced to go into the first contention as it appears to us to be correct that the Negotiable Instruments Act of 1881 or any similar Act was not in force in the former State of Bikaner.

We shall, therefore, deal with the arguments advanced before us on the footing that the provisions of the Negotiable Instruments Act, 1881, in terms cannot be held to apply to the present cases although we are clearly of opinion that the principles underlying those provisions must be held to be applicable as rules of equity, justice and good conscience, or as being rules which are observed generally in practice among the merchants in this country.

7. The first contention raised on behalf of the defendant appellant was that the endorsements made on the hundis in favour of the plaintiff were not sufficient and valid u/s 15 of the Negotiable Instruments Act as they were not signed by him except in the case of suit No. 331, as already pointed out above.

We may here quote in extenso the endorsements in question. The endorsement in case No. 331 is in these terms:

^^gqUMh csph dU;S;kyky odhy pqUuhyky jkedqaokj flxM+hokys gkFk dh %
dUgS;kyky odhy**

(Chunnilal was the father of Ramkumar and Sigdiwala appears to be the surname). It is obvious that it bears the signature of Kanhyalal at the end. The endorsement on the other eight hundis was in the following terms:

^^gqUMh csph dUgS;kyky odhy pqUuhyky jkedqaokj gkFk A**

These endorsements though in the handwriting of Kanhyaial, however, do not bear his signature at the end. It is, therefore, argued that he was not an endorser at all and no liability for the payment of the hundis arose against him. Section 15 of the Negotiable Instruments Act is in these terms:

"When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same and is called the "indorser"."

The question is whether in the absence of his signature at the end of the wording on the hundis In cases Nos. 332 to 339, it can be held as a valid endorsement within the meaning of Section 15 or the principle underlying therein. We may point at once in this connection that the endorsements on the hundis in cases Nos. 332 to 339 were all made in the hand-writing of the present defendant appellant Kanhyaial and this is indeed not disputed before us.

The only contention that is raised is that they should have been further signed by him in order to amount as valid endorsements. It is important to bear in mind in this connection that there is no explanation before us as to why and how Kanhyaial came to write the wording that he had sold the hundis to the plaintiff. He did not join the trial and was not prepared to swear to what was his side of the case.

In these circumstances, we are persuaded to hold that the endorsements were made by him as things complete in themselves. He had written them in his own hand-writing and there could be no other objective in his writing all that he did, unless he wanted to authenticate the fact of the sale of the hundis in favour of the plaintiff.

We are, therefore, disposed to hold that the endorsements in these cases were as much executed by Kanhyaial as in case No. 331 where he admittedly put his signature beneath the endorsement.

We are supported in this view by the rule laid down in J. and D. Eziekel, Carrying Business under the Name and Style of Ezeikel and Co. Vs. Annada Charan Sen, where a number of English cases were considered such as Johnson v. Dodgson (1837) 2 MW 653 and Caton v. Caton(1867)2 LR 127 and the principle was laid down that it was not necessary that the signature in order to be binding should

be at the foot of an endorsement. It may be in the beginning or middle of it. The question always is, whether the party, not having signed it regularly at the foot, yet meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it.

In other words, whether the insertion of the name in any part of the writing was for the purpose of authenticating the instrument. There is not the slightest suggestion in the present case that Kanhyaial had refused to put down his signature at the foot of the endorsement because he wanted to leave it unfinished for any particular reason.

On the other hand, we have no doubt whatsoever on the evidence led in this case as well as from the conduct of Kanhyaial that he had put the very endorsements on the hundis to authenticate their sale in favour of the plaintiff.

We should also like to add that what matters is the substance and not the outward form of the wording, and that so long as the debtor's name has been affixed on the document in question in such a way as to make it appear that the document is his and that he is the real author of it, it does not matter what the form of signature is nor is it necessary that the signature must appear in any particular part of the document, and it may appear in any part provided that the intention of the parties is to acknowledge the instrument to be his. (See also *Het Ram Padamchand, Firm v. Firm Subhag Chand Rikab Das* AIR 1941 Oud 376 in this connection). We, therefore, hold that there was a valid endorsement in the present case and that Kanhyaial was the endorser in all of them.

8. It was next argued that even so, the said endorsements were without consideration and that the plaintiff was not entitled to sue the defendant appellant on their basis. It was also argued that the case as disclosed in the plaint was of one character and that the Courts below have held his claim to be proved on different considerations.

We propose to deal with these points together, as, in our opinion, they are connected with each other. Now, so far as the case as disclosed in the plaint is concerned, it was in the substance that the defendant appellant and his father, with whom we are not concerned, were in need of funds and that they had contacted the plaintiff for the purpose.

The plaintiff, however, was not willing to pro-Vide the defendant with funds except on some kind of security and defendant Kanhyalal was the person who stood as surety. This arrangement was effectuated by Hazarilal executing certain hundis upon his own firm, Kanhyalal being the "rakhia", and these hundis were then and there endorsed by Kanhyalal in the plaintiff's favour although this roundabout method was adopted by the parties for certain reasons which were best known to themselves.

This arrangement, in our opinion, clearly imports two things: (1) that consideration had passed from the plaintiff to the defendant Hazarilal through

the instrumentality of Kanhyalal and that Kanhyalal had certainly undertaken the position of a surety or an endorser.

This would also be the liability attaching to Kanhyalal in consonance with the principle underlying Section 37 of the Negotiable Instruments Act, according to which the drawer of a bill of exchange is, in the absence of a contract to the contrary, until acceptance and the acceptor thereafter are liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the drawer or acceptor, as the case may be.

The sworn testimony of Ramkumar is to the same effect, and it is that the defendant No. 3 Kanhyalal was desirous that the plaintiff should provide the other defendants with funds in connection with certain building contracts which they had undertaken and that although he was reluctant to do so at the beginning, he expressed his concurrence as the defendant appellant was prepared to stand as surety for the return of the money, and that it was in fulfilment of this purpose that all the hundis had been drawn by the defendants with the present appellant as the intermediary, and the latter had sold all the hundis in favour of the plaintiff.

Ramkumar also said that he had paid the amounts of the hundis to defendant appellant Kanhyalal, and Kanhyalal had passed them on to Hazarilal. There is no rebuttal of this evidence whatsoever. In these circumstances, we are entirely unable to agree that there is any substantial variation between the case of the plaintiff as disclosed in the plaint and the evidence led by him at the trial to prove it.

Substantially his case was the same, and, therefore, we reject the contention raised on behalf of the defendant appellant that any infirmity attaches to the plaintiff's case on this account. We are also not at all impressed by the further contention that the endorsements made by the defendant appellant were without consideration.

From the facts which we have stated above, there is not the slightest doubt that the various sums of money covered by the nine hundis were paid by the plaintiff to the defendant appellant in the first instance, who passed them on to Hazarilal or that, alternatively, the plaintiff would never have advanced the monies to Hazarilal unless Kanhyalal was prepared to stand as surety for Hazarilal and give effect to this arrangement by the execution of the hundis in the manner in which they were executed and the necessary endorsements by Kanhyalal were made in favour of the plaintiff.

We are fully satisfied that there was consideration and that Kanhyalal cannot escape liability on this score. We are also satisfied that Kanhyalal had endorsed these hundis in favour of the plaintiff and delivered them to the latter with the object that he might recover dues thereon from the parties concerned and that he was therefore a holder in due course having come into possession of the hundis for consideration as an endorsee thereof.

9. It was next argued that the parties had agreed to have the matter settled by reference to arbitrators in the trial Court and that simply because one of the arbitrators had refused to act as an arbitrator at the instance of the plaintiff, the trial Court should not have superseded the reference or proceeded to decide the case itself. There is no force in this contention either.

It appears that the parties including Kanhyalal had expressed their readiness in the trial Court to have the matter decided by arbitration. Thereafter one of the arbitrators expressed his unwillingness to act as an arbitrator, and the Court superseded the arbitration and decided to proceed with the case itself.

It is contended that the Court did not give notice to the present appellant of such supersession and that it should have itself appointed an arbitrator or arbitrators on the failure of one of them to act as such. Reliance was placed on Section 8 of the Arbitration Act.

A perusal of that section shows, however, that it is up to a party where an appointed arbitrator refuses to act to serve the other parties with a written notice to concur in the appointment or appointments or in supplying the vacancy, and if no appointment is made within fifteen clear days after the service of the said notice, the Court may, after hearing the parties itself, appoint an arbitrator or arbitrators.

In the first place, Kanhyalal did not give any notice u/s 8, and it was not for the Court to give any notice to him regarding supersession of the arbitration. It must also be noted that Section 8 occurs in Chapter II which deals with arbitration without intervention of a Court, which was admittedly not the case here.

The procedure as to arbitration in suits is contained in Chapter IV and Section 25 thereof provides that the provisions of the other chapters shall, so far they can be made applicable, apply to arbitration under this Chapter.

There is, however, a proviso to this section, which clearly states that in any of the circumstances mentioned in Section 8 and certain other sections with which we are not concerned, the Court may, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit.

It is clear, therefore, that under the proviso, the Court was perfectly competent to supersede the arbitration and proceed with the suit itself. This contention therefore is also without any force.

10. It was next contended that in the cases before us there was no presentation of the hundis for acceptance or payment by the plaintiff to the drawee, or to the endorser on maturity; and, therefore, the defendant appellant who was the endorser was completely absolved from all liability in respect of these hundis.

It was further strenuously argued that the plaintiff also failed to give a notice of dishonour to the defendant appellant and, therefore, in any view of the cases

before us on the other points involved, this was sufficient to non-suit the plaintiff so far as the appellant was concerned.

11. Now, we wish to emphasize, even at the risk of some repetition, that in our view, the stringent or technical provisions of the Negotiable Instruments Act with respect to presentment or notice of dishonour cannot be called into operation in determining the liability in the case of hundis which came to" be executed in a territory where there was no such Act in force at the relevant time.

We may also invite attention in this connection to Section 1 of the Negotiable Instruments Act, which clearly provides that nothing contained in, the Act shall affect any local usage relating to any instrument in an oriental language provided that there is no intention to the contrary, and hundis before us are admittedly in an oriental language. That being so, we consider that the rights of the parties concerned with respect to these hundis fall properly to be determined only on the basis of and in consonance with the principles underlying the Negotiable Instruments Act or in accordance with the general custom in vogue in dealing with such instruments among merchants in this part of the country as to which custom, however, the parties neither made any allegation nor led any evidence on this record.

12. Against this background, we should like to say that a contract embodied in a bill of exchange or for that matter in a hundi, generally speaking, is that the drawer says to the payee that on the bill being presented to the drawee at the due time, that is, on maturity, the latter shall honour it. Thus, presentment for payment by the holder of a negotiable instrument appears to be an essential step for fixing liability for non-payment on the drawer.

We may, however, point out in this connection that presentment for acceptance does not appear to us to be a requirement of principle and need not be insisted upon (even Section 61 which deals with presentment for acceptance is limited in its terms to a bill of exchange payable after sight).

So far as presentment for payment is concerned, Section 64 of the Negotiable Instruments Act embodies the principles that promissory notes, bills of exchange and cheques must be presented for payment respectively to the maker, acceptor, or drawee thereof by the holder or anybody authorized by him.

The section further indicates that in default of such presentment, the other parties thereto are not liable thereon to such holder. Then Section 66 further provides that a bill of exchange or a promissory note made payable at a specified period after date or sight thereof, must be presented for payment at maturity.

This rule of presentment for payment is however subject to certain well recognized exceptions which are enumerated in Section 76 of the Act, and one such exception is as respects the drawer where the drawer could not suffer damage from the want of such presentment. See Pachkauri Lal and Another Vs. Mulchand and Another, "Shankar Das v. Firm Dittoo Ram Idan AIR 1927 Lah 72

and "Chandra Dat v. Chandar Sen" AIR 1934 Oud 254 It was contended that certain decisions have laid down that the burden of proving that the drawer could not possibly suffer any damage lies on the person suing on the hundi. But we are clearly of opinion that such a burden is extremely slight and is easily discharged in a case where the drawer and the drawee are one and the same person.

The want of presentment in such a case obviously cannot put the drawer to any loss because he must be deemed to know that the hundi was executed and a certain date was the due date of payment thereunder and that no payment had been made at maturity.

13. Applying the principles underlying the provisions mentioned above, we find that the drawer of the hundis in all the cases was Bansilal Hazarilal and the drawee was also Bansilal Hazarilal and were the same persons. It was argued that as the hundis were signed by Hazarilal only (though on behalf of Bansilal Hazarilal) the drawer was different from the drawee.

We are not prepared to accede to this argument for "ex facie" the hundis were drawn on behalf of Bansilal Hazarilal on themselves and we must construe the hundis accordingly. The question whether Bansilal was liable on these hundis or not would be altogether a different matter and has really nothing to do with the question whether the drawer and the drawee of the hundis are the same or not. See *pachkauri v. Mul Chand (E)*".

We accordingly hold that the drawer and the drawee in the cases before us are one and the same and, therefore, it follows that presentment to the defendant Hazarilal who was undoubtedly the drawer was not necessary.

14. That, however, does not conclude the matter because the plaintiff seeks not only to hold Hazarilal responsible (against whom these suits have been decreed by the trial court and there has since been no appeal by him) but the present appellant Kanhyalal who is the endorser.

15. Now, so far as the liability of an endorser is concerned, Section 35 of the Negotiable Instruments. Act puts that liability in these terms:

"In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without, in such indorsement expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such indorser as hereinafter provided".

The provisions relating to notice of dishonour are contained in Chapter VIII in Sections 91 to 98 thereof. Section 93 enacts that the holder must give notice of dishonour to all parties whom he seeks to make liable except to the drawee or acceptor of the dishonoured bill.

Section 94 prescribes the mode in which notice may be given, that the notice may be oral or in writing and that it must be given within reasonable time after dishonour, and Section 98 specifies cases where notice of dishonour is unnecessary. We must turn to Sections 105 and 106 to determine what is "reasonable time" for giving notice of dishonour.

Section 106, provides that where the holder and the party to whom notice of dishonour is given carry on business or live (as the case may be) in different places, such notice is given within a reasonable time if it is despatched by the next post or on the day next after the day of dishonour and where the parties carry on business or live in the same place, such notice is given within a reasonable time if it is despatched in time to reach its destination on the day next after the day of dishonour.

16. Now it may be accepted at once that the provisions as to adequacy of time for the notice of dishonour are in the nature of technical provisions and a strict compliance thereof need not be called for where the Negotiable Instruments Act in terms does not come into operation.

The only requirement which may be insisted upon as a matter of principle is that such notice must be given within "reasonable time" having regard to the circumstances of a particular case and the nature of the instrument involved and the usual course of dealing with respect thereto.

Bui the point of importance is that a notice of dishonour must be given so far as the endorser is concerned, and we consider that to be a matter of principle and not a mere technicality, and we further consider that failure to give a notice of dishonour within reasonable time must absolve the endorser from all liability to the holder.

That is the principle which underlies Section 35 of the Negotiable Instruments Act and must be enforced in the case of hundis even though the Act may not, in terms, be applicable to them.

This rule is in perfect accord with justice, equity and good conscience because if such a requirement were not to prevail, the endorser may come to know of the dishonour only at such time as the holder may choose to fix at his own sweet-will and pleasure and then it may be impossible for the endorser to do anything to protect his own interests as against the drawee. We propose to refer to a few decided cases in support of our view.

17. The first case is reported as "Jeetun Loll v. Sheo Churn", 2 SWR 214 and dates as far back as 1835 before the Negotiable Instruments Act of 1881 was enacted. The precise question there was slightly different and was whether the omission by the holder to give notice of dishonour discharges the drawer of a hundi from liability, and it was held that it did.

It was held by the learned Judges that according to English law, such notice was indispensable in order to charge either the drawee or the endorser with the

payment of the bill and if any party who was entitled to notice of non-payment has not due notice thereof, he will be discharged from all liability to pay the bill.

As regards the contention raised to the effect that the "mahajanee" custom did not contemplate any notice of dishonour and that non-service of notice did not protect a drawer, it was held that no such custom was alleged or proved and reference was made to the case of *Ishree Pershad* 3 S. D. A. Rule 178 (I) in which on an examination of a number of Calcutta merchants, it was laid down that the invariable practice was to give immediate notice, and that they had never heard of an instance where this practice was departed from.

Lastly it was laid down that though the strict English law regarding bills of exchange was not applicable to transactions in which one of the parties was a native of India, still the holder of a bill to be entitled to sue the maker, must give him notice of dishonour or non-payment within such reasonable time as will enable him to protect himself.

This case clearly brings out the significance of the notice of dishonour before the Negotiable Instruments Act was enacted. The only other point which we wish to make in this connection is that the liability of an endorser, to our mind, would appear to stand even on a more difficult footing than that of the drawer of a bill of exchange where he is also the drawee as in the case before us.

18. The next case to which we would like to refer is -- "*Anunt Ram v. R. D. Nuthal*", 21 SWR 62 which arose in 1873 and relates to the liability of an endorser. It was held that although the technical provisions of the English law as to the time within which service of the notice of dishonour would be made, they were not applicable, yet the endorsee was bound to give the endorser notice within a reasonable time of his intention to come upon the latter so that he may be in a position to take the necessary steps for the protection of his own interests.

19. In "*Moti Lal v. Moti Lal*" 6 All 78 it was held that unless any local usage to the contrary was proved, the doctrine of notice of dishonour should be applied to One hundis which were in the vernacular, and that "the reasonable time" within which such notice should be given was to be determined according to the circumstances of the case, and it was further laid down that the doctrine of notice was based upon a just and equitable principle.

It was, therefore, held that where the holder of such a hundi, which had been dishonoured, sued the prior indorsees on it, without having given them such a notice, and did not prove that they could not suffer damage for want of such notice, the suit must fail.

20. The same principle has been upheld in several old cases which arose before the Negotiable Instruments Act came into force, and we do not wish to multiply instances.

We, therefore, hold that the requirement of a notice of dishonour to an endorser

by the endorsee underlying Section 35 of the Negotiable Instruments Act is a matter of principle and that such notice must be given within a reasonable time where the endorsee wants to raise his claim against the endorser. This requirement may be dispensed with only in the case of negotiable instruments in an oriental language where a local usage or custom is established to the contrary,

21. These then being the correct principles, let us see how they work out in the cases before us. We may state at once that there was no allegation much less proof on this record to show that there was any custom relating to hundis in the former State of Bikaner according to which a notice of dishonour was unnecessary.

In para 4 of the plaint in case No. 331, the plaintiff alleged that on the expiry of the muddat on Kati Vadi 10 Smt. 2005 (which corresponds to the 27th October, 1948) he presented the hundis to the defendants (no particular defendant was mentioned) but no payment was made and the hundi was dishonoured. It is important to bear in mind that the hundi in this case was drawn by Bansilal Hazarilal on Asad Vadi 9 Smt. 2005 (corresponding to the 1st July, 1948) and was made payable 121 days after date.

The one hundred and twenty-one days expired in this case on 30-10-1948, but the hundi is said to have been presented to the defendants on Kati Vadi 10 corresponding to 27-10-1948, This presentation was made before the date of maturity and was utterly useless. We have, however held above that as the drawer and the drawee were one and the same in the cases before us, no presentment was necessary.

We are, therefore, not prepared to hold these suits bad on this ground by itself. But whether there was presentment for payment or not, a notice of dishonour by the plaintiff was, in our opinion, absolutely necessary to make the present appellant who is the endorser liable for non-payment of the hundis.

It is true that such notice need not be formal and in writing and could be oral, but it must have been given within a reasonable time of dishonour or non-payment. Now, there is no allegation whatsoever in the plaint that a notice of dishonour was at all given. All that the plaint contains is that the hundi was presented to the defendants on the expiry of the muddat on 27-10-1948, and that they did not honour it.

When the plaintiff came into the witness-box, he did not say anything in his examination-in-chief as regards notice of dishonour and vaguely stated that he had presented the hundi in case No. 331 to the defendants on the expiry of the muddat and while he said so he did not specify any date whatever with the result that at the best the date of refusal of payment was the date mentioned in the plaint, i.e., the 27th October, 1948.

In his cross-examination the plaintiff stated, however, that on Haaarimal's refusal to make the payment he (the plaintiff) presented the Hundi to the

defendant appellant Kanhyalal whereupon the latter said that the payment of Hazarimal's bills would be shortly received and that the plaintiff should wait for a month or two. There the statement stops, and it is not said further how the plaintiff reacted to this suggestion.

To us it clearly appears that the learned District Judge misread the plaintiff's statement in this connection when he says in his judgment that Kanhyalal had "promised to pay the amounts of the hundis as soon as Hazarimal's P. W. D. bills are encashed in a month or two".

But the plaintiff said nowhere in his deposition that. Kanhyalal had made any such promise. All he told the plaintiff was to wait for a month or two until Hazarimal would receive payment of his bills, the clear implication being that then Hazarimal would pay the amount of the hundi under reference.

The conclusion of the learned District Judge that as Kanhyalal had himself made a promise to pay the amount of the hundi and therefore no notice of dishonour was necessary according to clause (g) of Section 98 cannot be possibly sustained in law for the simple reason that (to repeat the material wording of that clause) Kanhyalal had never "promised unconditionally to pay the amount due on the instrument". Alternatively the District Judge appears to have taken this talk between Hazarilal and Kanhyalal to be in itself a notice of dishonour.

In the first place it is extremely difficult to accept that as a notice of dishonour because the object of a notice of this description is not to demand payment but clearly to indicate to the party notified that the contract arising on the negotiable instrument has been broken by the principal debtor and that the former being a surety will now be liable for the payment. This is the principle embodied in Section 93 of the Negotiable Instruments Act.

Secondly, even the refusal of payment according to the plaint in case No. 331 was made on 27-10-1948, which is before the date of maturity and no other date was specified by the plaintiff either in his plaint or in his examination when he demanded the payment. The fact of the matter, to our mind, clearly is that the plaintiff did not give any notice of dishonour to the endorser at all.

Again, the plaintiff did not say a word in his deposition as regards the refusal of payment so far as the other hundis are concerned. It may be mentioned here in this connection that all the suits being between the same parties and involving common questions of law and fact, had been consolidated in the trial Court and there was a single trial, and the plaintiff examined himself only once in connection with all the cases.

But even with respect to hundis in suite Nos. 332 to 339, the plaintiff stated in the plaint that the said hundis, executed on Asad Sudi 3 Smt. 2005 equal to 9th July, 1948, and being made payable after 31 days after date, were presented to the defendants on Sawan Sudi 4 Smt. 2005 corresponding to 8-8-1948, and, therefore, the plaintiff was asking for their payment prematurely and what we

have stated in connection with the hundi in case No. 331, fully applies to the hundis in these cases.

We were also invited to consider the only other possibility that the suit itself was a notice of dishonour to the endorser. Apart altogether from the consideration that this is a very weak and doubtful argument, it is enough to say in this connection that as we have already held above, there must not only be a notice of dishonour to the endorser by the holder to make the former liable such a notice must be given within a reasonable time of dishonour of the hundis.

Now, the suits were filed on the 23rd July, 1949, i.e. about nine months after the date of maturity of the hundi in case No. 331 and about eleven months after the date of maturity in the case of hundis in other cases. We are altogether unable to hold that such a notice would be reasonable.

In this view of the matter, we are constrained to come to the conclusion that the plaintiff holder failed to give any notice of dishonour to the defendant endorser which it was imperative for him to do and that he has failed to substantiate any valid ground such as custom or any other which might have exempted him from giving such notice.

The inevitable result, therefore, of this omission is that the defendant endorser must stand absolved of all liability for the payment of the hundis in question in accordance with the principle underlying section 35 read with section 93 of the Negotiable Instruments Act, and we hold accordingly.

22. As we have arrived at a firm conclusion on the point of notice of dishonour, we have not felt it necessary to canvass the further question in connection with presentment for payment, namely, whether such presentment to the drawer was also necessary in order to make the endorser liable.

As the drawer and the drawee are the same in this case, we were during the course of arguments disposed to think that such presentment was unnecessary, but on the view which has commanded itself to us, we do not consider it necessary to express any considered opinion on that aspect of the case.

23. We also wish to take this opportunity of pointing out that the plaintiff in a suit based on a negotiable instrument where he is the endorsee must state clearly in his plaint that a notice of dishonour was sent to the endorser and must give the particulars thereof or where he considers that he is exempt from giving this notice, he should allege the facts which exempt him from giving such notice.

The notice may be oral or written but it is necessary that it must have been given within a reasonable time. The notice must also clearly intimate that payment was demanded from the drawee but refused and that the holder holds the person notified liable on the instrument.

The importance of this requirement lies in the consideration that the giving of a notice of dishonour is a part of the plaintiff's cause of action and is a condition

precedent for making the endorser liable and in the absence of such a notice, his liability to the endorsee must stand extinguished.

24. The net result is that we allow these appeals, set aside the judgments and decrees of the courts below and dismiss the plaintiff's suit so far as the present appellant is concerned. Having regard to all the circumstances of the cases, we would leave the parties to bear their own costs throughout.